

Research Article

A new EUtopia – Understanding Common European Asylum System (CEAS) and the criminalisation of migration in Europe

Linn Pfitzner^{1*}

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Abstract

The aim of this paper is to expound and critically analyse the proposed reform of the Common European Asylum System (CEAS) in December 2023. Drawing on insights from migration science and political philosophy, it argues that political agreement on the controversial reform can best be understood through a Foucauldian lens, conceptualising the European border regime as a biopolitical space in which migrant lives are contested. Against the background of the ever-expanding criminalisation and securitisation of migration, analyses of disciplinary and biopower offer unique insights into modern-day European asylum and border politics. The article criticises the bifurcation of European rights discourses in light of this trend, and calls for differentiated engagement with developments in European asylum politics.

Keywords Common European Asylum System • criminalisation • securitisation • migration • biopolitics • disciplinary power

¹ Linn Pfitzner is a graduate of the LLM in Global Environment and Climate Change Law. With an interdisciplinary background, Linn is interested in intersections of social justice and forced migration. They have experience researching European discourses around queerness and asylum, on which they have published in university journals in the Netherlands and Canada.

1. Reforming the Common European Asylum System

On December 20th, 2023, following months of political discord between the European Union (EU)'s co-legislators, the European Council ("the Council") and the European Parliament ("the Parliament", "EP") proudly announced the reform of the Common European Asylum System ("CEAS"). The reform had been in the making for seven years, with prior political agreements mirroring many of the changes that are now to be consolidated into a piece of legislation.² Responses from EU decision-makers have overwhelmingly been positive, with the President of the EU Parliament Roberta Metsola hailing the deal as "historic" and the Council as a "breakthrough".³ Contrarily, civil rights organisations have highlighted the devastating consequences of the reform for the right to asylum, contesting that it will likely create "an ill-functioning, costly, and cruel system that falls apart on implementation and leaves critical issues unaddressed".⁴

Without pre-empting a more detailed analysis, the CEAS reform must necessarily be considered within its socio-political context and, in particular, in light of trends of criminalising and securitising migration. Whilst such links are well-established in the literature, current amendments to the European asylum system constitute a significant expansion of previous criminal logics.⁵ For example, wider access for law enforcement

² European Council on Refugees and Exiles, 'A Possible Agreement on the Reform of CEAS at the Council in June: What Is at Stake?', June 2023, <https://ecre.org/wp-content/uploads/2023/06/CEAS-EXPLAINER.pdf>.

³ Council of the EU, 'The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System', 20 December 2023, <https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/the-council-and-the-european-parliament-reach-breakthrough-in-reform-of-eu-asylum-and-migration-system/>; Jon Henley, 'EU Reaches Asylum Deal That Rights Groups Say Will Create "Cruel System": Plan Is Aimed at Spreading Cost of Hosting Asylum Seekers across Bloc and Limiting Number of Arrivals', 20 December, 2023, n.d., <https://www.theguardian.com/world/2023/dec/20/eu-reaches-asylum-deal-human-rights-groups-cruel-system>.

⁴ Border Violence Monitoring Network, 'New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum', 20 December 2023, <https://borderviolence.eu/app/uploads/New-Pact-Final-Outcome.pdf>; N.A., 'Over 50 NGOs Pen Eleventh-Hour Open Letter to EU on Human Rights Risks in Migration Pact', PICUM, 18 December 2023, <https://picum.org/blog/open-letter-eu-human-rights-risks-migration-pact/>.

⁵ See for example Valsamis Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*, 1st ed. 2015 (Cham: Springer International Publishing, 2015), <https://doi.org/10.1007/978-3-319-12658-6>.

authorities to a palette of personal data can only be understood under the pretext of preventing crime and securing the EU's external borders.⁶

The present submission analyses the CEAS reform decided in December 2023, shedding light on key elements of criminalisation and securitisation therein by adopting a biopolitical lens on migration. The paper has a tripartite aim, explaining key developments in EU migration policy, fostering awareness amongst the readership, and exposing insincerities in EU rights discourses. Considering the bifurcated rights narratives employed in the European context, whereby infringements on the rights of some ("irregular" migrants) are used to justify the protection of the rights of others (EU citizens), it is argued that the Foucauldian concept of biopolitics is better-suited than conventional rights accounts, for understanding the increasing criminalisation and securitisation of migration. Given the focus on racialised migration politics below, the discussion extends beyond asylum applicants to other forced migration identities or racialised groups of third-country nationals ("TCNs"). Insofar as racial logic functions as independent of legal reasonings, European migration policy produces similar effects for people with different identities. In particular, limitations on accessing asylum procedures highlight the importance of expanding the conversation beyond individuals who successfully lodged an asylum application. For this reason, reference will similarly be made to other identities, with the term "migration" in the present context denoting avenues for individuals with a forced migration background.

Given that the literature is already replete with analyses of rights threatened by a repressive European migration policy, the present submission abstains from reproducing them.⁷ Nevertheless, it should be noted that, in a jungle of legal liability, individuals have failed to successfully bring actors such as the European Border and Coast Guard Agency, Frontex, to justice.⁸ Similarly, border activities of Member States ("MS") have rarely been subject to intense scrutiny by European courts, with collective

⁶ Cf. Mitsilegas; Daniel Thym, *European Migration Law*, 1st ed. (Oxford: Oxford University Press, 2023).

⁷ See for example Mitsilegas, *The Criminalisation of Migration in Europe*; Thym, *European Migration Law*.

⁸ See *WS and Others v European Border and Coast Guard Agency (Frontex)*, No. Case T-600/21 (Court of Justice of the European Union 6 September 2023).

expulsions (or “pushbacks”), for example, not contravening applicants’ rights where they are due to a person’s “own conduct”.⁹

These insights highlight that rights discourses are inadequate for exhaustively explaining the inherent logic of European migration policy. In the context of the CEAS reform, this justifies recourse to a Foucauldian approach, which offers a more sound basis for understanding the present trajectory of European migration and border politics.

The remainder of the paper is structured as follows. Section 2 discusses the use of Foucauldian approaches in migration research, as well as criminalisation and securitisation trends that have emerged in EU migration policy over the last decade. This provides the background for a brief overview of key components of the CEAS reform. Section 3 engages with relevant criticism of the reform and places this in the context of the biopolitics of migration. Finally, section 4 concludes by discussing implications of the present analysis, highlighting that a biopolitical understanding of migration can stimulate wider critical engagement with the topic, which is crucial for opening up the possibility for discourses beyond rights-based approaches in light of criminalisation and securitisation logics.

2. The politics of migration

a. The dialectic criminalisation and securitisation of migration

Processes of criminalisation and securitisation in European migration policy have been analysed at length.¹⁰ Following Mitsilegas, this paper adopts a threefold definition of the criminalisation of migration, constituted by (i) recourse to substantive criminal law for regulating migration, (ii) the application of crime governance methods, and (iii) the use of preventative measures.¹¹ Their prevalence in European migration policy is evidenced

⁹ N.D. and N.T. v Spain, Nos. Cases 8675/15 and 8697/15 (European Court of Human Rights 13 February 2020).

¹⁰ E.g., Mitsilegas, *The Criminalisation of Migration in Europe*.

¹¹ Mitsilegas.

throughout the discussion below, with crime governance methods like surveillance or detention particularly emphasised.¹²

Criminalisation is closely intertwined with a securitisation discourse at the EU level. Controlling borders and immigration is justified by national security objectives, with techniques heavily drawing on traditional criminal law enforcement tools, such as detention or surveillance.¹³ Against the logic of securitisation, strengthening border security is a reasonable response to migration as a threat to European sovereignty.¹⁴ A key development in the European context is the use of advanced technology and databases, which rely on the input of vast amounts of personal information. Cutting-edge technology is a key requirement for ensuring the operability of borders, as individual border crossings in the 21st century substantially exceed human processing capacities.¹⁵ In this context, data stored in the Schengen Information System, for example, permits MS at external borders to enforce entry-bans issued by other EU countries.¹⁶

Whilst large-scale employment of technology is *per se* legitimate, it can become problematic when information is made available to different law enforcement authorities beyond the original purpose for its collection to enable the interoperability of different databases.¹⁷ Concerns about data privacy are silenced by claims of combating crime and terrorism.¹⁸ One example of how the securitisation of migration functions in this regard is through the obligations imposed on carriers to furnish immigration authorities with passenger registries, which can then be cross-referenced with information stored in a diverse array of databases.¹⁹ MS thereby outsources immigration control to private actors that have little incentive to permit access to EU territory to individuals who fail to

¹² Cf. Mitsilegas.

¹³ Mitsilegas.

¹⁴ Nick Vaughan-Williams, *Europe's Border Crisis Biopolitical Security and Beyond* (Oxford: Oxford University Press, 2017).

¹⁵ Cf. Thym, *European Migration Law*.

¹⁶ Thym.

¹⁷ Mitsilegas, *The Criminalisation of Migration in Europe*.

¹⁸ Thym, *European Migration Law*.

¹⁹ Mitsilegas, *The Criminalisation of Migration in Europe*; Thym, *European Migration Law*.

fulfil particular entry requirements, such as potential asylum applicants lacking a valid visa. Such processes indicate decentralised migration management, examined in greater depth in the following section through the Foucauldian lens of “biopolitics”.

b. Biopolitics and migration

Following the well-known philosopher Michel Foucault’s ideology, power is relational, produced by repeated confrontations at a decentralised level throughout society.²⁰ More specifically, “biopower” denotes “numerous and diverse techniques for achieving the subjugation of bodies and the control of populations”, a phenomenon primarily discussed by Foucault with respect to industrialisation.²¹ Similarly, Foucault uses the concept of “biopolitics” to describe collective mechanisms for disciplining bodies. At the heart of this are biological processes such as births and deaths, supervised through repeated and incisive interventions aimed at governing the population of industrialised societies.²² Viewed as such, biopower constitutes the ability to control the life of particular populations, both by fostering or denying it (i.e., death).²³

Biopolitics as a modern exercise of power, centred around caring for and maximising life, therefore represents a shift from prior expressions of sovereign power as the right to “take life or let live”.²⁴ In this sense, biopower is also distinct from disciplinary power, which in the Foucauldian sense constitutes power directed towards the individual, commonly including elements of surveillance and control.²⁵ In its most profound form, disciplinary power does not require constant monitoring of the individual but derives its potency from the threat or possibility of being monitored, which causes individuals to regulate their behaviour under the expectation of punishment for deviance.²⁶

²⁰ Michel Foucault, *The History of Sexuality. Volume 1, The Will to Knowledge*, trans. Robert Hurley (London: Penguin Books, 2020).

²¹ Foucault, 140-141.

²² Foucault.

²³ Foucault.

²⁴ Foucault, *The History of Sexuality. Volume 1, The Will to Knowledge*, 140.

²⁵ Cf. Vaughan-Williams, *Europe’s Border Crisis Biopolitical Security and Beyond*.

²⁶ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (London: Penguin Books, 2019).

Applying this to migration, several authors have described disciplinary and biopolitical practices in European migration and border governance. Mitsilegas, a scholar in this area, explores the criminalisation of migration through Foucauldian tools like surveillance and detention.²⁷ Beyond disciplinary mechanisms, Vaughan-Williams conceptualises EU asylum politics as “Janus-faced”, insofar as “irregular” migrants find themselves in the limbo of being framed either as a (security) threat themselves or as an individual whose life is threatened.²⁸ Similarly, Gebhardt focuses on the biopolitical power of fostering migrant life or disallowing it in the context of European border politics. Combining the Foucauldian analysis of biopower with Mbembe’s analysis of postcolonial necropolitics, Gebhardt argues that European migration policy has shifted from the management of migrant life to managing migrant death.²⁹ This is most apparent in spaces such as the Mediterranean, considered one of the most lethal border areas in the world.³⁰

The analysis above exposes the effects of criminalisation and securitisation discourses on migrant bodies. Generalised controls of migrant populations both arise from and are enabled by an increasing unwillingness in the European political arena to protect individuals on the move. This warrants a particular focus on the most recent CEAS reform as symbolic of how overlapping understandings of biopolitics and biopower inform European migration governance. The ensuing section considers this, in parallel with broader insights concerning criminalisation and securitisation trends in migration policy.

c. Key components of the CEAS reform

The CEAS reform agreed upon in December 2023 is based on five pillars, amending previous asylum legislation while simultaneously expanding it. Each pillar is discussed

²⁷ Mitsilegas, *The Criminalisation of Migration in Europe*.

²⁸ Vaughan-Williams, 43.

²⁹ Mareike Gebhardt, ‘To Make Live and Let Die: On Sovereignty and Vulnerability in the EU Migration Regime’, *Redescriptions: Political Thought, Conceptual History and Feminist Theory* 23, no. 2 (15 December 2020): 120–37, <https://doi.org/10.33134/rds.323>; Achille Mbembe, ‘Necropolitics’, *Public Culture* 15, no. 1 (1 January 2003): 11–40, <https://doi.org/10.1215/08992363-15-1-11>.

³⁰ Gebhardt, ‘To Make Live and Let Die’.

below with respect to its most prominent elements and significant changes to previous instruments.

Firstly, the legislators have decided to replace the 2013 Asylum Procedures Directive with the Asylum Procedure Regulation (“APR”), thereby increasing the level of harmonisation between MS in handling asylum applications.³¹ The APR fundamentally transforms the asylum procedure through the introduction of a mandatory border procedure. This operates as a “fast-track” procedure, whereby asylum applications considered as unfounded or inadmissible can be dealt with more efficiently, permitting authorities to directly return or transfer applicants to a third state.³² The APR will mandate the application of the procedure in instances where an applicant is considered a danger to national security or public order, or where they have furnished false or incomplete information, but also for applicants from countries with a recognition rate below 20%.³³

Secondly, the Asylum and Migration Management Regulation (“AMMR”), replacing the existing Dublin Regulation, governs the responsibilities of countries for handling asylum applications. Similar to the Dublin system, applicants must be processed by the MS of first entry or legal stay.³⁴ The AMMR does not introduce mandatory relocation mechanisms; instead, these only constitute one of the measures through which countries can express support for other EU states. Further options constitute financial contributions, either to MS directly or to third countries, and alternative measures such as deploying personnel or capacity building.³⁵ States have absolute discretion as to their choice of solidarity mechanisms.

³¹ Council of the EU, ‘The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System’.

³² Council of the EU; Border Violence Monitoring Network, ‘New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum’.

³³ Council of the EU, ‘The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System’.

³⁴ Council of the EU.

³⁵ Council of the EU.

Thirdly, the Screening Regulation seeks to increase control at the EU's external borders by collecting biometric data from migrants and conducting mandatory security and health checks.³⁶ It aims to identify migrants not fulfilling the required entry conditions, thereby allowing their swift return. During the screening process, migrants are prohibited from entering the MS and "must remain at the disposal of the authorities", with the possibility of being placed in detention.³⁷

Closely connected to the screening process is, fourthly, the Eurodac Regulation. This serves as the legal basis for collecting biometric data, such as facial images or fingerprints, with the purpose of "better tackl[ing] irregular movements and monitor[ing] the paths of asylum seekers and persons in an irregular situation".³⁸ Beyond expanding data collection to children from the age of 6 onwards and beneficiaries of temporary protection, the new Eurodac Regulation will also significantly enhance access to personal data for law enforcement authorities.³⁹

Lastly, the Crisis Regulation constitutes a novel invention, permitting states to deviate from the applicable legal framework in situations of crisis, *force majeure*, or where migrants are being "instrumentalized", e.g., by a hostile regime. The Crisis Regulation substantially lowers procedural safeguards for applicants in such instances and allows MS, inter alia, to raise the recognition rate from 20 to 50% (i.e., fast-tracking applicants from countries with recognition rates below 50%).⁴⁰ Below, these legislative interventions are examined through a Foucauldian lens.

3. A Foucauldian approach to the CEAS reform

The present analysis consists of two parts. Section (a) examines the disciplinary character of the reforms under the new CEAS, many of which exhibit close links to discourses of securitisation and criminalisation. Section (b) focuses on the biopolitical

³⁶ Council of the EU.

³⁷ Council of the EU.

³⁸ Council of the EU.

³⁹ Council of the EU.

⁴⁰ Council of the EU.

elements of European asylum politics, emphasising the managerial character of the EU's new border regime. As will become evident, disciplinary and biopower are not mutually exclusive, and links between both will be made.

a. Disciplinary elements of the CEAS reform

The criminal law methods of surveillance and detention of potential asylum applicants, both expressions of disciplinary power, have primarily become relevant in the context of enabling the enhanced mobility of European citizens and other "benign" travellers.⁴¹ Disciplinary elements are, thus, a byproduct of an increasingly stratified mobility regime of a biopolitical quality, which "allow[s] circulations to take place, [...] control[s] them, sift[s] the good from the bad".⁴² "Irregular" migration in this context is presented as a threat to European sovereignty, which has necessitated the investment in sophisticated surveillance technology and military-style interventions, primarily through the activities of Frontex.⁴³ Vaughan-Williams points to the dialectic character of technological developments and restrictive migration policy, arguing that the former both responds to and facilitates the latter.⁴⁴ Beyond military-style aerial surveillance technologies such as drones, satellites, and GPS tracking, another important disciplinary mechanism of European migration politics is outsourcing border security to private actors, as discussed above.⁴⁵ Given that such systems of pre-border control largely limit possibilities to access international protection, their incompatibility with the EU asylum *acquis* has been stressed repeatedly.⁴⁶ Following Moreno-Lax, processes that deny potential applicants for international protection access to MS territory are counterintuitive insofar as they largely deprive the right to asylum of its *effet utile*.⁴⁷

⁴¹ Cf. Vaughan-Williams, *Europe's Border Crisis Biopolitical Security and Beyond*.

⁴² Vaughan-Williams, 39; Thym, *European Migration Law*.

⁴³ Vaughan-Williams, *Europe's Border Crisis Biopolitical Security and Beyond*.

⁴⁴ Vaughan-Williams.

⁴⁵ Vaughan-Williams.

⁴⁶ Violeta Moreno-Lax, "The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law", in *Research Handbook on EU Migration and Asylum Law*, eds. Evangelia Tsoardi and Philippe De Bruycker (Northampton: Edward Elgar Publishing, 2022); Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017).

⁴⁷ Moreno-Lax, "The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law".

Similar effects can be observed for humanitarian visas. In *X and X v État belge*, the Court of Justice of the European Union (“CJEU”) indirectly confirmed the legality of denying visas to individuals for the intended purpose of applying for international protection.⁴⁸ Such logic extends beyond the EU’s external borders to cooperations with third states, which receive funding in exchange for the promise to immobilise people on the move.⁴⁹ These create further uncertainty around the legal accountability of actors in the migration field, thereby limiting the availability and accessibility of remedies for rights infringements.

Elements of the trend towards enhanced surveillance and disciplining the movement of migrants are constitutive of the CEAS reform. The reformed APR permits the large-scale detention of people, including families with children, as part of the border procedure.⁵⁰ Screening, in particular, operates under the legal fiction of “non-entry”, creating a further incentive for border guards to detain individuals for its duration.⁵¹ The strength of the securitisation and criminalisation mechanisms at play is aptly illustrated by the limited procedural safeguards for applicants during detention: they have no access to legal representation, and their right to appeal decisions taken during border asylum procedures lacks suspensive effect, thereby stripping it of its utility.⁵² Investments in detention mechanisms and border surveillance activities will likely be strengthened by MS who are unwilling to support the relocation of asylum applicants from border states to their own territory, as the new “solidarity mechanism” under the

⁴⁸ *X and X v État belge*, No. Case C-638/16 PPU (Court of Justice of the European Union 7 March 2017).

⁴⁹ See for example the EU-Turkey Statement, discussed in Thomas Spijkerboer, ‘Bifurcation of People, Bifurcation of Law: Externalisation of Migration Policy before the EU Court of Justice’, *Journal of Refugee Studies*, no. 2 (8 December 2017): 216–239, <https://doi.org/10.1093/jrs/fex038>.

Achille Mbembe, ‘Necropolitics’, *Public Culture* 15, no. 1 (1 January 2003): 11–40, <https://doi.org/10.1215/08992363-15-1-11>.

⁵⁰ European Council on Refugees and Exiles, ‘A Possible Agreement on the Reform of CEAS at the Council in June: What Is at Stake?’

⁵¹ Border Violence Monitoring Network, ‘New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum’.

⁵² Border Violence Monitoring Network.

AMMR provides them with full discretion in opting for financial measures which support the construction of further detention centres (both at the border or in third states).⁵³

A less visible disciplinary intervention in the trajectories of migrants is the augmented retention of personal data. Establishing and operating vast immigration databases under the pretext of security and crime prevention is not a novelty but has significantly contributed to securitising migration for the past decade or two.⁵⁴ The overarching preventative logic has expanded access for law enforcement authorities to personal data across different databases, questioning whether the use of such data is still related to the purpose for which it was collected.⁵⁵ Legitimate day-to-day activities such as visa applications are subjected to intense scrutiny, permitting the construction of elaborate “risk profiles”. This particular aspect of securitising migration has important consequences for individuals whose data is collected. Not only does the criminal prevention logic *prima facie* void a presumption of innocence, but the risks of racial profiling are also similarly high.⁵⁶ Applicants have no means of knowing which data is being collected in order to contest its use.⁵⁷ Correspondingly, they are under a constant threat of supervision, resulting in a form of digitised panopticism.

Concerning the CEAS reform, this is particularly visible in the amended Eurodac Regulation. The database substantively expands the range of profiles captured (e.g., of people engaged in secondary movements or minors from the age of 6 onwards), as well as introduces new categories of data stored (particularly biometrics) and enhances access thereto for law enforcement authorities.⁵⁸ This permits the mass surveillance of movements into and throughout Europe for most people without a European passport, which constitutes a gross violation of their privacy. Overlaps between migration and criminal databases under the rationale of interoperability further strengthen the existing

⁵³ Cf. Council of the EU, ‘The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System’.

⁵⁴ Mitsilegas, *The Criminalisation of Migration in Europe*.

⁵⁵ Mitsilegas.

⁵⁶ Mitsilegas.

⁵⁷ Mitsilegas.

⁵⁸ Border Violence Monitoring Network, ‘New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum’.

trends of criminalising and securitising migration in a European context.⁵⁹ Section (b) below examines how such disciplinary measures are situated within the context of the EU's biopolitical border management.

b. The biopolitics of the European border system

At the nexus of European sovereignty and cross-border movements, biopolitics determines the forms of migration considered as “healthy” for a European population.⁶⁰ The resulting legal-political distinctions separate migrants into different categories (“regular” or “irregular”), thereby producing social realities and subjectivities which have significant consequences for individual trajectories.⁶¹ A “successful” European border control in this context is defined by the number of “irregular” migrants identified.

The paradoxicality of this process, whereby curbing “irregular” migration is contingent on a greater number of “irregular” migrants apprehended, is evident with respect to the concept of “adequate capacity” under the reformed APR.⁶² The adequate capacity of MS is established in reference to the number of “irregular” border crossings and entry refusals.⁶³ This figure is then used to calculate the maximum amount of asylum applications MS are required to evaluate in the border procedure.⁶⁴ Rather than being responsive to current protection needs and activity on migratory routes, this strictly numerical approach betrays the biopolitical management of Europe's borders.

A further element of European migration politics laid bare by the CEAS reform is its inherent racism. Building on Foucault, Gebhardt argues that the biopolitical border regime operates on the basis of racial processes of Othering, whereby migrants are excluded from European life by virtue of being deemed a threat thereto.⁶⁵ In this context, European sovereignty must be defended through the identification and elimination of the

⁵⁹ Border Violence Monitoring Network; Mitsilegas, *The Criminalisation of Migration in Europe*.

⁶⁰ Cf. Gebhardt, 'To Make Live and Let Die'.

⁶¹ Vaughan-Williams, *Europe's Border Crisis Biopolitical Security and Beyond*.

⁶² Vaughan-Williams.

⁶³ Council of the EU, 'The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System'.

⁶⁴ Council of the EU.

⁶⁵ Gebhardt, 'To Make Live and Let Die'.

racialised migrant Other which threatens it.⁶⁶ It is important to note that, in the Foucauldian sense, “killing” describes not only the direct taking of a life but also exposing others to death or expelling individuals to territories considered unsafe.⁶⁷ Correspondingly, a restrictive European migration regime which denies entry to some or removes individuals from MS territory to “safe third countries” corresponds to a Foucauldian logic of making life and letting die.⁶⁸ Racism, in this context, is a necessary precondition for allowing the death of some.⁶⁹

Rather than constituting a philosophical surmise about the nature of European migration policy, the CEAS reform provides evidence for this racialised border management. As noted above, the Eurodac Regulation expands data collection to a wide variety of TCNs under the pretext of ensuring temporal limits on their retention. However, Ukrainian refugees who have been awarded temporary protection are exempt from this.⁷⁰ The Council fails to provide its reasoning for this stratified data collection, suggesting an absence of juridical-categorical justifications.

An additional element of the CEAS reform, which highlights the prioritisation of biopolitical border management over rights protection and legal certainty, is its inbuilt flexibility mechanisms. As outlined above, the Crisis Regulation, in particular, permits substantial deviations from the “conventional” procedural framework. The discursive construction of situations of “mass arrival” as a crisis denies the reality of migration as endemic to human existence.⁷¹ This practice of redefining further deflects responsibility for addressing the root causes of this phenomenon (beyond European practices of providing financial assistance to third countries for hindering people on the move from reaching Europe).

⁶⁶ Gebhardt.

⁶⁷ Michel Foucault, *‘Society Must Be Defended’: Lectures at the Collège de France, 1975-76*, ed. Mauro Bertani and Alessandro Fontana, trans. David Macey, 2020.

⁶⁸ Foucault; Gebhardt, ‘To Make Live and Let Die’.

⁶⁹ Foucault, *Society Must Be Defended*.

⁷⁰ Council of the EU, ‘The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System’.

⁷¹ Cf. Gebhardt, ‘To Make Live and Let Die’.

In a biopolitical sense, lowered safeguards for applicants in situations of crisis are justified by the purpose of “easing the burden on overstrained national administrations”.⁷² In such circumstances, detention and surveillance mechanisms act as a shield for national sovereignty and security, however, with questionable effects for asylum seekers. The applicability of the Crisis Regulation to situations of “instrumentalisation”, in particular, exposes the dehumanisation of European border politics, whereby the potential hostility of third states, or even non-governmental organisations engaging in search and rescue operations, takes priority over the right of individuals to apply for asylum.⁷³ In this environment, biopower is transformed into “necropower”, i.e., the ability to expose some people to death, with European sovereignty correspondingly constituting the *raison d’être* for being able to determine the disposability of certain bodies over others.⁷⁴ Or, as Commission president Von der Leyen puts it, “Europeans will decide who comes to the EU and who can stay”.⁷⁵

Against this background, exceptions under the Crisis Regulation, according to which instrumentalisation situations permit MS to streamline all applicants into the border procedure, effectively eradicate the substantive content of applicants’ right to asylum.⁷⁶ Such instances of biopolitical border management may partially be the consequence of MS’ experiences with border instrumentalisation by hostile third states such as Belarus in the early 2020s.⁷⁷ This, however, runs counter to the jurisprudence of the CJEU in *Commission v Poland and Hungary*, where the Court ruled that unexpected and significant increases in applications for international protection do not justify systematic

⁷² Council of the EU, ‘The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System’.

⁷³ Border Violence Monitoring Network, ‘New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum’.

⁷⁴ Mbembe, ‘Necropolitics’.

⁷⁵ Henley, ‘EU Reaches Asylum Deal That Rights Groups Say Will Create “Cruel System”: Plan Is Aimed at Spreading Cost of Hosting Asylum Seekers across Bloc and Limiting Number of Arrivals’.

⁷⁶ Border Violence Monitoring Network, ‘New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum’.

⁷⁷ Urszula Glensk and Ed Vulliamy, “On the frozen frontiers of Europe with the migrants caught in a lethal game: Asylum seekers are pawns in a conflict between Poland and Belarus”, *The Guardian*, November 7, 2021,

<https://www.theguardian.com/world/2021/nov/07/on-the-frozen-frontiers-of-europe-with-the-migrants-caught-in-a-lethal-game>.

infringements of the right to asylum by MS.⁷⁸ This highlights that even courts may be powerless insofar as legislative reform strengthens the biopolitical management of European migration.

4. The way forward?

While the Global Approach to Migration and Mobility in 2011 still called for a “migrant-centred approach” to European asylum politics, such discourses have been scarce in recent policy documents, with similar conclusions to be drawn for rights-based narratives.⁷⁹ Correspondingly, what Vaughan-Williams calls the “chronic continuum of border violence that continues to beset Europe in the twenty-first century” can best be explained by examining the biopolitical structures of European migration management.⁸⁰ The most recent iteration of draconic measures, constitutive of the continuing trend of criminalising and securitising migration matters, is exemplary thereof. Surveillance and detention mechanisms, which form an integral part of the CEAS reform agreed upon in 2023, are apt for comparisons with Foucauldian disciplinary power. Equally, the clinical management of migration according to predefined quotas can best be understood in the context of biopolitics and biopower.

This paper has made the case for adopting a Foucauldian lens on European migration policy and examined the CEAS reform in light of this against general trends of criminalising and securitising migration. It has argued that, whilst processes like large-scale deployments of technology or cooperation with third states are unproblematic *per se*, under the pretext of safeguarding national sovereignty, such mechanisms are employed at the expense of potential asylum applicants. Similarly,

⁷⁸ European Commission v Poland, Hungary and the Czech Republic, No. Joined Cases C-715/17, C-718/17 and C-719/17 (Court of Justice of the European Union 2 April 2020).

⁷⁹ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The Global Approach to Migration and Mobility’, 18 November 2011, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0743>.

⁸⁰ Vaughan-Williams, *Europe’s Border Crisis Biopolitical Security and Beyond*, 34.

rights protection is eroded under the CEAS reform through biopolitical border management, for example, in the context of instrumentalisation discourses.

Whilst the above-employed conceptual tools help understand recent developments in EU migration policy, they should not be taken as a justification thereof. Instead, they serve to highlight the consequences of bifurcated EU human rights politics, whereby the propagation of the rights (or “life”) of some takes place at the expense of the rights of others (curbing their right to life). As employing a Foucauldian lens is primarily useful for problematising this process, rights discourses remain relevant for developing tangible solutions thereto. When combining these two perspectives and adopting a relational understanding of power, there is a possibility for formulating alternative discourses around migration across various fora in European society.

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